88-1885

NO. _____

Supreme Court, U.S.
FILED
MAY 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MITCHELL RAY LEONARD, PETITIONER

V.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT AND MOTION TO VACATE THE JUDGMENT BELOW

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QUESTIONS PRESENTED

1. Whether petitioner's Texas convictions for two burlaries of a habitation and one burglary of a building, are convictions for violent crimes under the law of the jurisdiction (the State of Texas) in which those convictions were obtained and thus sufficient to support enhancement of appellant's sentence pursuant to 18 U.S.C. 924(e)(1) and accordingly whether the Congress of the United States of America can subsequently, by definition, alter the character of the underlying offenses - and the resulting convictions - by defining them as violent for the purpose of sentence enhancement.

2. Whether the Fifth Circuit has correctly interpreted whether Congressional intent of 18 U.S.C. 924 or the common law definition of burglary embraced by the Ninth Circuit should be applied.

3. Whether a post factum recharacterization of petitioner's prior offenses violates his due process rights as guaranteed by the Fifth Amendment of the United States?

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PETITION FOR CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
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The Petitioner Mitchell Ray Leonard respectfully prays that a writ of certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered March 20, 1989.

OPINIONS BELOW

The opinion of the court of appeals has not yet been reported. (App. A, infra, A1-A26). The opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals (App. A, infra A1-A26) was entered on March 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The court has jurisdiction in this matter on two basis. The opinions of the Courts of Appeals conflict on the definitions of "burglarly" to be applied to 18 U.S.C. 924. Furthermore, the highest criminal court in the State of Texas and the Fifth Circuit court also conflict. For these reasons we believe that this issue is ripe for review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 922 of the Armed Career Criminals Act Pub.L. 97-377, Title I, § 165(a), Dec. 21, 1982, 96 Stat. 1923; Pub. L. 99-308, § 102, May 19, 1986, 100 Stat. 451; Pub.L. 99-408, § 2, Aug. 28, 1986, 100 Stat. 920; Pub.L. 100-649, § 2(a), Nov. 10, 1988, 102 Stat.

3816; Pub.L. 100-690, Title VII, § 7060(c), Nov. 18, 1988, 102 Stat. 4404 provides:

> (g) It shall be unlawful for any person-
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. Section 924 of the Armed Career Criminals Act Pub.L. 98-473, Title II, §§ 223(a), 1005(a), Oct. 12, 1984, 98 Stat. 2028, 2138; Pub.L. 10-308, § 104(a), May 19, 1986, 100 Stat. 456; Pub.L. 99-570, Title I, § 1402, Oct. 27, 1986, 100 Stat. 3207-39; Pub.L. 100-649, § 2(b), Nov. 10, 1988, 102 Stat. 3817; Pub.L. 100-690, Title VI, §§ 6211, 6212, 6451, 6460, 6462, Title VII, §§ 7056, 7060(a), Nov. 18, 1988, 102 Stat. 4359, 4360, 4371, 4273, 4402, 4403. provides:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug office, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

STATEMENT

On or about April 7, 1988, the Appellant Mitchell Ray Leonard was arrested in Austin, Texas, within the Western District of Texas, and in his possession were found two 9 mm pistols.

On February 2, 1988 the Petitioner was indicted for violations of 18 U.S.C. 922(g)(1) and 924(e) for knowing and unlawful possession in commerce and affecting commerce of two firearms, one Browning, model Hi Power,

9mm pistol and one Smith and Wesson 9 mm pistol. It was further alleged in the indictment that the Petitioner had been previously convicted in the Courts of the State of Texas of three felonies, that is, two burglaries of a habitation and one burglary of a building.

The Petitioner filed a timely Motion to Dismiss (Record p. 125-128)[1] which requested the Court to dismiss the portion of the indictment which alleged a violation of 18 U.S.C. 924(e)(1), in that § 924(e)(1) was a sentence enhancement provision and did not constitute a separate criminal offense.

On April 22nd, after consideration of briefs and the arguments of counsel, the Court below entered an order granting the Petitioner's Motion to Dismiss (Record: p. 105-110) and which further provided that all

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[1]All citations to the record are to the official certified record. Copies of this record will be provided to the court, in full, should certiorari be granted.

portions of the indictment which alleged a violation of 18 U.S.C. 924(e)(1) were dismissed.

The remaining elements of the indictment which alleged a violation of 18 U.S.C. 922(g) remained in effect.

On April 29, the United States Attorney notified the Defendant and the Court of his intention to seek enhancement of any sentence imposed upon Mitchell Ray Leonard, after any conviction in the case, pursuant to the provisions of 18 U.S.C. 924(e) (Record: p. 79-80.)

On May 26, 1988 the Petitioner plead guilty to a violation of 18 U.S.C. 922(g) as alleged in the indictment, but requested of the Court the opportunity to brief and argue to the Court the suitability of sentence enhancement pursuant to 18 U.S.C. 924(e)(1).

On June 17, 1988, the Petitioner timely filed his Motion to Deny Enhancement of

Sentence and supporting brief (Record: p. 22-31). The U.S. Attorney filed his response to Petitioner's Motion on July 14, 1988. A hearing on the motion was held on July 15, 1988 at which time the Court denied the motion. An order was entered by the Court on July 19, 1980 (Record: p. 6-9).

On July 22, 1988 the Court sentenced the Petitioner to 15 years confinement for his violation of 18 U.S.C. 922(g) after enhancing the sentence pursuant to the provisions of § 924(e)(1). The Court's action was taken after receipt of a stipulation entered into by the United States of America and the Petitioner concerning three prior convictions under Texas law and in Texas Courts in 1975, 1976 and 1980 and the sworn testimony of the Petitioner concerning those offenses and convictions. Those convictions and offenses are more specifically described as follows:

1. Burglary of a habitation in Cause No. F 75-2354-JK on August 8, 1975 in Criminal District Court No. 4, Dallas County, Texas;

2. Burglary of a building in Cause No. F 76-5546-PK on July 30, 1976 in Criminal District Court No. 4, Dallas County, Texas; and

3. Burglary of a habitation in Cause No. F 79-11876-RK on February 14, 1980.

The Petitioner, although entering into the above referenced stipulation, specifically continued his assertion that the application of 18 U.S.C. 924(e)(1) to enhance his sentence for a violation of 18 U.S.C. 922(g) was unlawful and that the Court's denial of his Motion to Deny Enhancement was in error. The Court acknowledged the Petitioner's continuing position on this point. That assertion, which is the essence of this appeal will be discussed in greater detail hereafter.

Petitioner brought an action in the United States Court of Appeals for the Fifth Circuit seeking to have the enhanced sentence he

received pursuant at 18 U.S.C. 924(e) set aside. Jurisdiction of the Court of Appeals was established as an appeal as a matter of right. The Court of Appeals for the Fifth Circuit affirmed the opinion of the United States District Court for the Western District of Texas, upholding the sentence enhancement.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the interaction between state and federal criminal laws and the rights of criminal defendants in cases where the interaction of these laws fails to be clear. While this case is important to the petitioner, Mitchell Ray Leonard, it is also potentially important to any criminal defendant in Texas who is facing conviction and sentence enhancement pursuant to 18 U.S.C. 922(g) and 18 U.S.C. 924(e)(1). Pursuant to 18 U.S.C. 924(e)(1), enhancement of a sentence

issued for a violation of 18 U.S.C. 922(g) can occur when a person to be sentenced has been convicted of three prior convictions for a "violent felony." We will argue that the burglary convictions upon which Mitchell Ray Leonard's sentence enhancement was based were not at the time of the convictions, nor are they today considered to be violent crimes per se under the laws of the State of Texas. We would further urge that petitioner's sentence to fifteen years confinement pursuant to 18 U.S.C. 924(e)(1) is not lawful and should be set aside because the burglaries for which petitioner was convicted did not involve "violent crimes" as required by the statute. At least one United States Court of Appeals Judge appears to concur in the opinion that this issue is ripe for Supreme Court Review. Senior Circuit Judge Bright is U.S. v. Taylor, 864 F.2d 625, 630 (8th Cir. 1989), noted that:

> "neither this panel nor this writer need uncritically accept a prior panel opinion which may be flawed. I suggest the rule

> of this case and Portwood in deciding that every burglary defined under state law qualifies as a 'violent felony' pursuant to 18 U.S.C. § 924(e)(2)(B)(ii) needs re-examination by this court in banc or by the United States Supreme Court."

We will also argue that federal circuit courts have recognized the application of the state law definition of burglary to the offenses undefined in 18 U.S.C. 922(g), noting that the Congress, in failing to define crimes such as violent burglary, left these definitions up to the individual state jurisdiction. We will also argue that the Federal Circuits disagree with respect to the type of burglary sufficient to sustain sentence enhancement. Furthermore, even if the Congressional action was not entirely invalid, because some Texas burglary convictions presumably are for burglary offenses which do, in fact, involve violence or threat of violence, there must, at a minimum, be evidence supporting the conclusion

by the sentencing court that the defendant's convictions were for offenses which did involve violence. The record in this case, does not support the finding that petitioner's three prior convictions contained the violence or potential violence requisite as either a matter of law or a matter of fact, therefore we would argue that they cannot be used to support sentence enhancement under 18 U.S.C. 924(e)(1). Furthermore, we would also argue that Congress, by enacting this statute in 1986, sought to redefine the nature of petitioner's previous criminal convictions in a manner violative of his due process rights.

We argue that the petitioner's three prior offenses are not the nature of offenses to which the Armed Career Criminals Act was intended to apply. The legislative history of the Act indicates that it was intended to strike at the "worst and most deserving" criminals. 130 Cong. Rec. § 1559 (daily ed.

Feb. 23, 1984). This suggests that the intent of enhancement was to punish those who were guilty of far more than the general run of property offenses. The three convictions which support Mitchell Ray Leonard's sentence enhancement were for:

> (1) Burglary committed during the day, three months after his seventeenth birthday where he and another neighborhood minor stole a television, stereo and a few other items, most of which were subsequently returned.
>
> (2) Burglary of a building with a neighbor where Leonard was caught while still outside the building.
>
> (3) An arrest for attempting to use a stolen credit card to buy a pair of sunglasses. He was subsequently charged with burglary of a habitation and credit card abuse. Leonard maintains, and there is no evidence to suggest otherwise, that that card was obtained from someone else.
>
> Transcript of Proceedings, United States District Court for Western District of Texas, Austin Division, 7/22/88 at 23-24.

While it is clear that Leonard is indeed a repeat offender, the offenses which he has committed are not what could be or should be

classed as violent crimes. There is no apparent threat to any person from Leonard's actions. Nor are they sufficiently "criminal" to support application of the Armed Career Criminals Act. The legislative history of the Act indicates that its intended application was against those who commit violent or serious crimes, while not demeaning the seriousness of any criminal act, our prison system does not have the room or the resources to sustain criminals like Leonard for a minimum of fifteen years without parole based upon these types of convictions. We would ask that the court consider the intent and application of the Act in this case.

1. The United States Court of Appeals for the Eighth Circuit has considered the ambiguous status of "burglary" as defined in 18 U.S.C. 924(e). In United States v. Portwood, 857 F.2d 1221 (8th Cir. - 1988), reh'g and reh'g in banc den'd 12/13/88, the court considered

how burglary should be defined for the purpose of the statute. The appellants, in that case, attempted to argue that the "burglary" ambiguity required a resort to the legislative history in order to determine whether § 924(e)(2)(B)(ii) could be properly applied to burglary second degree under Missouri law. The court failed to concur with the appellant noting that "we find very little ambiguity on the face of the statute and, thus, no occasion to explore the legislative history." Supra at 1223. In holding that the intent and application of § 924(e) was clear, the court held "In our view, the statute says 'burglary,' and we take that to mean 'burglary,' however a state may choose to define it." Supra at 1224.

Texas case law recognizes the precept that not all felonies involve an act of violence or threatened violence as a matter of law. Certain felonies in Texas may involve

violence, but the existence of violence with respect to the commission of these felonies is not established per se. Hamilton v. State, 678 S.W.2d 90, 91 (Tex. App. - Eastland [11 Dist. - 1983). The determination of whether an individual felony offense involved an act of violence must depend on the facts and circumstances of each case. Schutz v. State, 646 S.W.2d 224 (Tex. Crim. App. 1983). These Texas cases recognize that the government in their indictment must allege and in the trial must prove that the felony involved an act of violence or threatened violence sufficient to meet statutory requirements.

The Texas Supreme Court, in the early case of State v. Robertson, 32 Tex. 159, __ (1869), concluded that while burglary by breaking did imply some level of force "it does not contemplate such force as would be denominated violence." The Texas courts have long held that burglary is not a crime of violence per

se; therefore, the violent nature of a burglary must be proved in every case where it is alleged. As Texas courts will not imply violence where it did not actually exist, it is incumbent upon the government to prove that the burglary offenses in question involved violence or threatened violence as alleged. Schutz v. State, 646 S.W.2d 224 (Tex. Crim. App. 1983). In Tew v. State, 551 S.W.2d 375, 378 (Tex. Crim. App. 1977) rehrg den'd, the court held that "[b]urglary does not per se involve violence, and whether a felony offense does involve violence must depend on the facts and circumstances of each case." See Gardner v. State, 699 S.W.2d 831 (Tex. Crim. App. 1985) (op. on reh'g) (holding that burglaries are not presumed to be crimes of violence), see also Powell v. State, 538 S.W.2d 617 (Tex. Crim. App. 1976). In Hill v. State, 748 S.W.2d 314, 315 (Tex. App.--Houston [1st Dist] 1988), the court

recognized the importance of obtaining evidence as to the violent nature of the underlying crimes, noting that a presumption of violence was not legally sufficient.

The court in Gardner v. State, supra at 836, considered the Texas habitual offender statute and the sufficiency of prior burglary offenses. The defendant, in this case, was convicted of possession of a firearm by a convicted felon pursuant to Texas law. Included among the elements of this offense was the requirement that the accused must have previously been convicted of a felony involving an act of violence or threatened violence. At issue was whether the accused prior burglary conviction was sufficient to sustain this burden.

The court found that, in order for the conviction to stand, the state was required to prove that the prior burglary conviction involved threatened violence or an act of

violence in that case. The opinion adheres to the rule of law in Texas which recognizes that burglary is not, per se, a crime of violence. The court in the Gardner case held "[w]e now reaffirm this holding and state unequivocally that proof sufficient to establish 'breaking' in a burglary prosecution under our former penal code, see V.A.P.C. Articles 1389 et seq., 1404b, does not automatically establish violence to property under § 46.05." Gardner, supra at 836. Under the Gardner holding, burglaries are not presumptively crimes of violence sufficient to support convictions pursuant to repeat or habitual offender enhancement statutes unless a separate showing by the prosecutor of violence has been made. See also Renteria v. State, 703 S.W.2d 329, 333-34 (Tex. App.--Corpus Christi [13 Dist.] 1985, no pet.).

Indeed, the Texas courts, in construing the state's repeat offender statute, have

noted that "whether a felony offense is within the scope of this statute must depend on the facts and circumstances of each case." Powell v. State, 538 S.W.2d 617, 619 (Tex. Crim. App. 1976). We argue that it was incumbent upon the Government to prove up the "act of violence" as alleged in the indictment. Further, we argue that these acts of violence should have been properly set out in the indicting document. See Cathy v. State, 402 S.W.2d 743 (Tex. Crim. App. 1966). Simply alleging that violence was involved should not be sufficient to uphold a fifteen year conviction. The sweeping applicability of § 924(e)(1) should not and cannot be allowed to override the state law definitions which control, and Texas State law has refused to define burglary as violent per se. See U.S. v. Portwood, supra.

Because federal appellate courts have bowed to the state law definition and because

Texas state courts have refused to define burglary as violent per se, we argue that defendant's conviction pursuant to 18 U.S.C. 922(g) and 18 U.S.C. 924(e)(1) should be overturned.

2. The United States Courts of Appeals are not in agreement on the definition of burglary applicable to 18 U.S.C. 924(e)(1). This statute provides for sentence enhancement in instances where a felon with three or more previous convictions for a violent felony or serious drug offense is found to be in possession of a firearm. This statute fails to provide any definition of burglary. The various Courts of Appeals differ as to what definition of burglary should be applied. We would urge that the common law definition of burglary should be the one applicable.

Dissenting Senior Circuit Judge Bright in U.S. v. Taylor, 864 F.2d 625, 627 (8th Cir. 1989), recognized that § 924(e) failed to define burglary. Noting that:

> "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1931).

We will argue that the common or established meaning of "burglary" should only encompass the common law definition because the meaning of "burglary" does fluctuate wildly among jurisdictions. The only sure and universal meaning is the common law definition. As Judge Bright noted:

> "[m]odern statutes setting out offenses denominated as burglary may or may not possess the common law elements of burglary. As such, burglary does not have an established 'modern' meaning. Moreover, no language in the enhancement statute dictates a meaning other than the common law meaning." Taylor, supra at 627; see W. Lafauc and A. Scott, Jr., Criminal Law 792 (2d. ed. 1986).

We would urge that the legislative history, thorough legal research and sound legal reasoning would support the application of the common law burglary definition. The

common law defines burglary as "breaking and entering the house of another in the nighttime, with intent to commit a felony therein, whether the felony be actually committed or not." BLACKS LAW DICTIONARY, 247 (4th Ed. 1951); see also Soders v. State, 81 Tex. Cr. R. 506, 195 S.W. 1146, 1147 (_____). This is the definition which should be applied to this Act.

The United States Court of Appeals for the Fourth Circuit has considered how burglary should be defined for the application of 18 U.S.C. 924(e)(1). The Fifth Circuit, in the Leonard opinion, refused to consider what definition of burglary applied. The Fifth Circuit court, in not applying either the Texas nor the common law definitions of burglary, reasoned that any burglary was sufficient to constitute a violent crime. We would like to argue that this conclusion is mistaken in fact and in law. In determining

what construction to give the word "burglary" used in § 924(e)(1), it is necessary to look to the definition of "violent felony" defined in the statute. Section 924(e)(2)(B) defines violent felony as:

> any crime punishable by imprisonment for a term exceeding one year that -
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

The Fifth Circuit refused to consider the application of this statute to the broad range of "burglary" violations and concluded simply that all burglaries fall within this purview. The Fourth Circuit persuasively argued that the statutory language at issue is sufficiently ambiguous to require resort to interpretive sources and canons.

The Fourth Circuit in U.S. v. Headspeth, 852 F.2d 753, 765 (4th Cir. 1988), considered whether a defendant's prior conviction for storehouse breaking was sufficiently violent to support sentence enhancement under § 924(e)(1), "Storehouse breaking" is defined in Maryland law as:

> breaking (into) a storehouse, filling station, garage, trailer, cabin, diner, warehouse or other outhouse or into a boat in the day or night with an intent to commit murder or felony therein, or with the intent to steal, take or carry away the personal goods of another of the value of $300 or more therefrom...

The Fourth Circuit, in holding that Storehouse breaking was not a sufficiently violent offense to support sentence enhancement, noted that:

> Quite plainly, this offense is not the sort of "violent felony" referred to in § 924(e)(2)(B)(i), for it does not have an element the use - actual, attempted, or threatened - of force against the person.

The court came to this conclusion by considering Congressional intent. Noting

that, as this Honorable Court has previously ruled, when Congress uses a common law term such as burglary without otherwise defining it, Congress is presumed to have adopted the meaning given the term at common law. Morrissette v. United States, 342 U.S. 246, 263 (1952). The Headspeth court stated that if burglary, as used in 18 U.S.C. 924, is defined in this manner, then storehouse breaking is not included in the offense because it is not required to take place at night or to invade the dwelling house of another. Indeed, if the use of the word "burglary" in § 924 is limited to the definition of common law burglary, then only burglaries of dwelling houses will be violent per se.

The government, in Headspeth, sought to argue that the legislative history and the purpose of the sentence enhancement provision demonstrate that Congress intended a broader

reading of burglary than that a common law. The scope of the Act was the subject of much Congressional debate and the final version of the bill overrode another version which contained a broader definition of burglary. This rejected provision would have ensured a reading of burglary which was broader than the common law definition. See Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 44 (May 21, 1986). Other rejected provisions would have allowed sentence enhancement for a broad range of property crimes. H.R. 4639, 99th Cong., 2d Sess. (1986). Because other proposed amendments sought to require that the underlying offense require force or attempted force against the person of another, the final version of this Act sought to bridge the gap between those who would include a broad range of property

crimes and those who would require actual physical violence against a person. United States v. Sherbondy, 865 F.2d 996, 1007 (9th Cir. 1988).

The court in U.S. v. Chatman, 869 F.2d 525, 528 (9th Cir. 1989), concluded that the overwhelming impression created by the legislative history and structure of § 924(e) indicated that "Congress intended 'burglary' to be a crime of particular danger to the person, and not to include all of the common property offenses that states might choose to denominate as burglary. As we said in Sherbondy, the provision as finally enacted includes four specific categories of property crime, each of which Congress believed involves conduct which poses a particularly serious 'risk of injury to another.'"

The Headspeth court noted that while at one time a broader reading was encompassed in

§ 924(e), the Congress repealed this definition of burglary. That court held that:

> Though the amended statute lists burglary as a predicate offense, it specifically deletes the broad definition of that term which had appeared in the original version of the statute. This omission, viewed in light of the efforts to remove burglary altogether from the list of predicate offenses, suggests that Congress intended to revert to the narrow common law definition of burglary in the amended statute. The common law definition is, to be sure, more consistent with the amended statute's focus on conduct which poses a serious risk of injury to the person. Absent more persuasive evidence that Congress intended the term "burglary" in amended § 924(e)(2)(B) to mean something else, we are reluctant to depart from the usual presumption that Congress intended the term to be given its common law meaning. Accordingly, we hold that the term "burglary," as used in § 924(e)(2)(B)(ii), means the breaking and entering of the dwelling house of another, in the nighttime, with the intent to commit a felony therein.
>
> Supra at 758.

Headspeth recognized the possibility that storehouse breaking could, in some instances, present the type of criminal situation which

might present some risk of injury to a person. However, the court reasoned that the crime was not one which, by its very nature, posed such a risk. Supra at 758-59.

The court recognized that this case presented a close issue but reasoned that the rule of lenity required a narrow reading of the statute. Pursuant to the well-established principle of statutory construction, which dictates that ambiguities in criminal statutes must be resolved in favor of lenity for the accused, the court found that the common law definition should be applied, absent any additional evidence to the contrary. United States v. Bass, 404 U.S. 336, 347 (1971); Rewis v. United States, 401 U.S. 808, 812 (1971). As this court has stated, "[t]his policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be

based on no more than a guess as to what Congress intended." Ladner v. United States, 358 U.S. 169, 178 (1958). In United States v. Gilbert, 813 F.2d 1523, 1526 (9th Cir.) cert. denied, _____ U.S. _____, 108 S.Ct. 173 (1987), the court found that, because a penal statute was involved, the Act should be strictly construed in favor of the accused. See United States v. Kelly, 527 F.2d 961, 964 (9th Cir. 1976).

A penal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983), § 924(e) does not provide a definition of the offense which is sufficiently definite to warn ordinary people with respect their conduct. If the Armed Career Felon's Act can indeed include

convictions for little more than credit card abuse among those offenses sufficient to support sentence enhancement, then the terms of § 924(e) are not only unclear they are actually misleading.

The Courts of Appeals, themselves, are in disagreement as to how the term burglary should be construed for application of the statute. Because it appears safe to assume that the Courts of Appeals have a higher level of sophistication than an "ordinary person" and the opinions of the courts indicate that the term is sufficiently indefinitely defined so as to confuse the Courts, we urge that, burglary as defined, is not sufficiently definite so that ordinary people could understand the meaning which Congress intended. Therefore, we would urge that the statute be construed with lenity, in the favor of the accused, and that the conservative common law burglary definition be applied.

This is the only statutory construction which would not encourage arbitrary and discriminatory enforcement.

Furthermore, the Fifth Circuit's attempt in Leonard, to accord Headspeth and their holding must fail because a legal argument based upon such purely semantic reasoning should have no merit. The court argues:

> In Headspeth the court held that a state offense not denominated 'burglary' is not burglary within the meaning of 924(e)(2)(B)(ii) unless the state offense fits within the common law definition of burglary.
>
> Headspeth Supra.

We do not believe that this argument presents a legally sufficient explanation for distinguishing these two cases. The court simply refused to recognize that a spade was a spade, no matter what it is labeled. Storehouse breaking as defined by the Maryland statute was sufficiently similar to the Texas conviction for burglary of a building to warrant comparison. The Fifth Circuit refused to consider this close issue.

While we wholeheartedly agree with the court that certain petty offenses should be distinguished from burglary, the argument that storehouse breaking, defined as the "breaking [into of] a storehouse, filling station, garage, trailer, cabin, diner or warehouse..." is likened in some way to the Texas offense of Burglary of Coin-Operated or Coin Collection Machine is patently unsupportable. Storehouse breaking encompasses the breaking into of various buildings and businesses similar to the Texas offenses of burglary of a building and bears no resemblance to the admittedly lesser petty offense of burglarizing a coin-operated machine.

Furthermore, in likening the offenses of storehouse breaking and burglary of a coin-operated machine the Fifth Circuit was grouping offenses which in actuality have little in common. Storehouse breaking is a felony in Maryland while burglary of a

coin-operated machine is a misdemeanor in Texas. It is interesting that the court, implicitly notes its own mistake, by recognizing that Headspeth's storehouse breaking involved an activity that was in actuality more violent than any of Leonard's convictions. Headspeth gained entry to a jewlery store by throwing a brick through a plate glass window. This act is apparently more violent than any of the acts committed by Leonard. However, the existence of violence and a potential threat to the lives and well being of citizens, in fact, is not of interest to the Fifth Circuit because the label of the crime does not contain the word burglary. This whole analogy must fail because it is simply unsupportable.

In the dissenting opinion in U.S. v. Taylor, 864 F.2d 625, 628 (8th Cir. 1989), Judge Bright argued that "[t]he majority ...subjects Taylor to the enhanced penalty

because the state labeled his conduct burglary following the majority's analysis to its logical conclusion, a traffic offense of wrongful parking; i.e., the taking of someone else's privilege of using a parking space, if labeled burglary by a state, could be used to enhance a sentence under section 924." This dissenting judge expressed the opinion that the application of a federal sentencing provision should not turn on the label given certain conduct by the various states. Noting that such an application would unconstitutionally treat similarly situated persons in different ways for the purposes of the federally imposed sentence.

This Federal Act must be interpreted in a uniform manner so as to ensure equal protection and equal application of federal law. Because uniform application is requisite, in the absence of a federal congressional definition for § 924(e) the only

available definition is the common law definition of burglary.

The Ninth Circuit, in the case of U.S. v. Chatman, 869 F.2d 525, 527 (9th Cir. 1989), recently considered whether "auto burglary" was sufficient to sustain sentence enhancement under the Armed Career Criminals Act. The court, following Headspeth, recognized the importance of not creating an inner circuit conflict on this issue. In adopting the Headspeth reasoning, the Chatman court held that "by leaving the term burglary undefined, Congress intended it to have its common law meaning. "'Burglary' therefore means the breaking and entering of the dwelling house of another, in the nighttime, with the intent to commit felon therein." Chatman, supra at 527.

The Chatman court, went on in dicta, to comment on the rationale for including burglary among those violent offenses sufficient for sentence enhancement under the

Armed Career Criminals Act. The court noted that "[b]urglary is entirely out of place in that list unless it is defined so that it describes a crime engendering serious risk of injury to persons." The court noted that simply the threat that a crime could possibly end in violence, was not sufficient to label every property crime violent per se. Such a definition would lead to construing every offense as a violent one. Indeed, the Chatman court recognized that the common law burglary definition would be the best suited to ensure that the purpose of the Armed Career Criminals Act is carried out. The court noted that the common law definition struck at the "worst and most deserving criminals" while avoiding such "bizarre results" as enhancement for such crimes as shoplifting. Supra at 529.

We urge the court to embrace the Ninth Circuit definition of burglary. Upon reviewing the legislative history, the common

law definition of burglary is the definition which best adheres to the intent of the legislature. We argue that the Fifth Circuit's refusal to consider legislative history resulted in an improper decision. We agree with Judge Bright's dissenting opinion in U.S. v. Taylor, 864 F.2d 625, 629 (8th Cir. 1989) that the legislative history of this statute clearly indicates that burglary should be narrowly construed for the purposes of § 924(e). As the Headspeth court noted:

> Though the amended statute lists burglary as a predicate offense, it specifically deletes the broad definition of that term which had appeared in the original version of the statute. This omission, viewed in light of the efforts to remove burglary altogether from the list of predicate offenses, suggests that Congress intended to revert to the narrow common law definition of burglary in the amended statute. The common law definition is, to be sure, more consistent with the amended statute's focus on conduct which poses a serious potential risk of injury to the person. Absent more persuasive evidence that Congress intended the term "burglary" in amended § 924(e)(2)(B) to mean something else, we are reluctant to depart from the usual presumption that Congress intended the term to be given its common law meaning.

Headspeth, 852 F.2d at 757-58. We further argue that the Fifth Circuit opinion on this matter should be set aside and the common law definition of burglary adopted.

3. The Appellant, in the Court below, stipulated that he was convicted in the Courts of the State of the following offenses under Texas law:

1. Burglary of a habitation in Cause No. F 75-2354-JK on August 8, 1975 in Criminal District Court No. 4, Dallas County, Texas;

2. Burglary of a building in Cause No. F 75-5546-PK on July 30, 1976; and

3. Burglary of a habitation in Cause No. F 79-11876-RK on February 14, 1980 in Criminal District Court No. 4, Dallas County, Texas.

In 18 U.S.C. 924(e)(2)(B), enacted by the United States Congress in 1986 as Public Law 99-570 § 1402(b), the Congress has provided a definition of "violent felony" which provides in pertinent part as follows:

> . . . the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that . . .

(ii) is burglary . . .

By enacting this statute, the U.S. Congress, in 1986, has sought to define all burglaries, including those for which Appellant was convicted, as "violent" felonies.

The question should be asked and answered whether or not this after the fact characterization of the Appellant's convictions is in violation of defendant's constitutional rights.

This is so because, if the Appellant's burglary offenses and convictions are considered "violent" felonies in the jurisdiction in which they occurred, then the Congressional definition of them as "violent felonies" is superfluous since they will independently serve as support for sentence enhancement pursuant to 18 U.S.C. 924(e)(1).

If the Appellant's burglary offenses and convictions are not considered "violent"

felonies under the law of the jurisdiction in which they occurred, then the Congressional definition of them as "violent" felonies is at odds with the law under which the convictions were obtained and amounts to an "after the fact," retrospective change in the elemental character of the Appellant's criminal conduct and resulting convictions.

Such a retrospective change would result in the deprivation of the petitioner's due process rights because the Congress, by imposing their own characterization on petitioner's prior offenses without review would in affect redefine the nature of these prior convictions. Given that the law of the jurisdiction where the offenses took place does not recognize burglary as violent per se, the recharacterization of these offenses as violent per se by Congress and the application of these recharacterized offenses to petitioner serves to deprive him of due

process of law as guaranteed in the Fifth Amendment of the Bill of Rights of the United States Constitution. The Fifth Amendment recognizes that no person may be deprived of life, liberty or property without due process of law. We would argue that the recharacterization of petitioner's offenses, without reopening and examining the specific nature of each offense, deprives petitioner of his due process privileges.

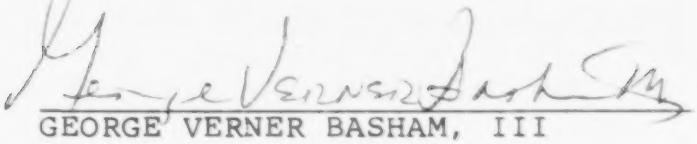
CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted. By the clear terms of 18 U.S.C. 924(e)(1) petitioner did not commit three violent felonies sufficient to sustain a sentence enhancement. We urge that the Fifth Circuit erred in adopting such a broad interpretation of burglary which is in direct conflict with the principles of levity

and statutory construction as promulgated by this Honorable Court.

The burglary convictions relied upon by the Fifth Circuit Court and the District Court are insufficient to support sentence enhancement for several reasons. They are not violent crimes per se in the jurisdiction where they arose, the burglary of a building and habitations during the daytime are not sufficient to constitute burglary for the purposes of sentence enhancement under 18 U.S.C. 924(e) because said convictions do not meet the common law definition of burglary as established by the court which should be the requisite definition for sentence enhancement purposes, and that there is no evidence which supports that any of these burglaries were violent in fact. We respectfully request that this court sustain this petition for certiorari.

Respectfully submitted,



GEORGE VERNER BASHAM, III
Attorney for Petitioner

May 1989

APPENDIX

APPENDIX A

United States Court of Appeals,

Fifth Circuit.

March 20, 1989.

PATRICK E. HIGGINBOTHAM,

Circuit Judge:

Mitchell Ray Leonard pled guilty to being a convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The district court enhanced his sentence pursuant to 18 U.S.C. § 924(e)(1), which provides for a fifteen year minimum sentence for those who violate § 922(g) and have three prior convictions for violent felonies. Leonard contends that the trial court erred by enhancing his sentence on the basis of his three Texas burglary convictions, and also argues that § 924(e) constitutes an unconstitutional ex post facto law. We affirm the sentence imposed by the trial court.

I.

Leonard was indicted for being a three-time convicted felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). Pursuant to Leonard's motion, the trial court dismissed those portions of the indictment alleging a separate violation of § 924(e)(1). The trial court correctly ruled that § 924(e)(1) was a sentence enhancement provision rather than a separate offense.[1] The government then noticed its intent to seek enhancement of Leonard's sentence pursuant to § 924(e)(1) based on his three prior convictions for burglary in Texas.

Leonard pled guilty to possessing a firearm in violation of § 922(g)(1), but moved to deny enhancement of his sentence under § 924(e)(1) on grounds that his burglary convictions were not "violent felonies" as

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[1]This issue was recently resolved in United States v. Affleck, 861 F.2d 97 (5th Cir. 1988) (§ 924(e)(1) is penalty enhancement provision rather than a separate substantive offense).

required by that provision. The parties stipulated that on August 8, 1975 and February 4, 1977, Leonard had been convicted of burglary of a habitation, and that on July 30, 1976, he had been convicted of burglary of a building. The government produced certified copies of these convictions. After a hearing, the trial court denied Leonard's motion. Leonard was later sentenced to fifteen years incarceration pursuant to § 924(e)(1).

II.

Leonard does not challenge his conviction under § 922(g)(1). His sole contention on appeal is that the trial court erroneously enhanced his sentence pursuant to § 924(e)(1).

Section 924(e)(1) provides, in relevant part, that:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years . . . .

18 U.S.C. § 924(e)(1) (Supp. 1988) (emphasis added.) "Violent felony" is defined at section 924(e)(2)(B), which reads:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that -
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B) (Supp. 1988) (emphasis added).

The trial court enhanced Leonard's sentence under § 924(e)(1) based on his three Texas burglary convictions. Leonard argues that this was error.

Leonard contends that § 924(e)(2)(B) defines as "violent felonies" only those offenses which involve actual or potential

physical injury to others. He argues that since the offense of burglary in Texas includes a variety of non-violent crimes, not all Texas burglary convictions come within the purview of § 924(e)(2)(B)(ii).[2] He claims that the trial court erred by enhancing his sentence without first analyzing the specific conduct underlying his burglary convictions to determine whether they involved actual or potential physical injury to others.

The government responds that in § 924(e)(2)(B)(ii) Congress made the determination that certain enumerated property crimes, including burglary, were offenses which involved potential physical injury to others. The government argues that the trial court need only consider such prior offenses in their generic sense, without looking at the underlying conduct to determine whether it involved the risk of violence.

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[2]"Burglary" is defined at common law as breaking and entering the dwelling house of

We begin with the plain language of the statute. See United States v. Turkette, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). "If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" Turkette, 452 U.S. at 580, 101 S.Ct. at 2527.

Section 924(e)(2)(B)(ii) defines "violent felony" as any crime that "is burglary, arson, or extortion . . ., or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). We read

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another, in the nighttime, with the intent to commit a felony therein. Texas has expanded this definition to include burglary of a habitation, building, coin-operated machine, or of a vehicle. Tex. Penal Code Ann. §§ 30.01-30.05 (Vernon 1989).

the clear language of the statute to designate these enumerated property crimes as "violent felonies" for purposes of sentence enhancement, without regard to whether the underlying conduct involved actual or potential violence. The plain language of subsection (ii) reflects Congress' determination that these property crimes present an inherent risk of violence. Leonard's construction of the statute, that actual or potential violence must also be established, renders superfluous the language in the first clause of subsection (ii). We have held that "'a statute should not be construed in such a way as to render certain provisions superfluous or insignificant.'" Woodfork v. Marine Cooks and Stewards Union, 642 F.2d 966, 970-71 (5th Cir. 1981).

Two circuits have recently rejected similar challenges to sentence enhancement under § 924(e)(1) based on the plain language

of the statute. In United States v. Dickerson, 857 F.2d 414, 418-19 (7th Cir. 1988), the Seventh Circuit rejected an appellant's argument that his three prior burglary convictions did not qualify as "violent felonies" because he was unarmed when he committed them. After reviewing the language of the statute, the court concluded:

> It is clear from the language of the statute that all burglaries satisfy the prerequisites of § 924. As the trial judge correctly noted, if Congress intended to include only crimes in which serious physical injury was involved, it would have worded the statute to say "burglary, arson, or extortion, and involves use of explosives or otherwise involves conduct that presents a serious risk of physical injury to another.

857 F.2d at 419 (emphasis in original).

Similarly, in United States v. Portwood, 857 F.2d 1221 (8th Cir. 1988), the Eighth Circuit rejected appellants' claim that their prior convictions for second-degree burglary under Missouri law did not justify enhanced punishment under § 924(e)(1).[3] While

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[3]Missouri defines second degree burglary

conceding that the definition of "violent felony" at § 924(e)(2)(B) included "burglary," appellants argued that the meaning of that term was ambiguous since the statute did not define it. The court disagreed, stating:

> [W]e find very little ambiguity on the face of the statute and, thus, no occasion to explore the legislative history. In our view, the statute says "burglary," and we take that to mean "burglary," however a state may choose to define it. Congress could quite reasonably conclude that no matter what the felon's intent upon breaking in, the property owner may return, a neighbor may investigate, or a law enforcement official may respond. All of these scenarios present a grave threat of harm to persons. A person with three prior convictions for burglary, regardless of the details of each burglary, presents the type of potential threat to society that Congress sought to control by the enactment of § 924(e).

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as "knowlingly" enter[ing] unlawfully or knowlingly remain[ing] unlawfully in a building or inhabitable structure for the purpose of committing a crime therein." Mo. Rev. Stat. § 569.170.1. As a felony, second degree burglary is punishable by imprisonment for a term exceeding one year. Mo. Rev. Stat. § 556.016.2.

857 F.2d at 1223-24. Accord United States v. Taylor, 864 F.2d 625 (8th Cir. 1989) (rejecting argument that second degree burglary is improper basis for sentence enhancement because, unlike first degree burglary, it involves no potential for violence).

We find further support for our conclusion in the Ninth Circuit's recent decision in United States v. Sherbondy, 865 F.2d 996 (9th Cir. 1988). In that case, the Ninth Circuit considered whether a prior conviction for preventing or dissuading a witness from testifying qualified as a "violent felony." As part of its inquiry, the court considered whether that offense fell within the scope of § 924(e)(2)(B)(ii) as a crime which "otherwise involves conduct that presents a serious potential risk of physical injury to another." The court conducted an exhaustive inquiry into the legislative history of the statute to

determine whether subsection (ii) contemplates an inquiry into the specific conduct underlying the prior conviction or whether the court should consider the offense only in its generic sense.

> One conclusion we draw from our review of the legislative history is that Congress consistently discussed subsection (ii) in categorical terms: i.e., in terms of what offenses it would include. There is no indication that Congress intended that a particular statutory or common law crime would in some circumstances constitute a violent felony and in other circumstances not, depending upon how the offense was committed. The first part of subsection (ii) sets forth specific property offenses that Congress expressly wanted to cover: that part, like subsection (i), is clearly categorical; a burglar, for example, cannot claim as a defense that his or her particular conduct was non-violent.

865 F.2d at 1008.

The Ninth Circuit went on to hold that when determining whether a prior offense is a "violent felony" under either subsection of § 924(e)(2)(B), the trial court should consider only the fact of conviction and the statute establishing the crime. The court

concluded that sentence enhancement was appropriate when, and only when, the statutorily defined crime fits within one of the categories of offenses listed in § 924(e)(2)(B). Sherbondy, 865 F.2d at 1009-1010. An offense comes within the ambit of subsection (ii) if the offense is denominated by one of the labels specifically enumerated or if the generic offense described in the statute fits the catch all "otherwise" category of that subsection.

As the Ninth Circuit has noted, requiring trial courts to conduct a factual inquiry into the specific conduct underlying a prior offense presents several difficulties. See Sherbondy, 865 F.2d at 1008. Evidentiary hearings would often require testimony about events many years past by witnesses who may no longer be available. Even if the court were to limit its inquiry to court records, substantial problems would arise where, as in

Leonard's case, prior convictions are based on guilty pleas and little or no record has been developed. In view of the absence of any statutory authorization or guidance as to the manner and scope of such an inquiry, we doubt that Congress intended the trial court to inquire into the specific conduct underlying each prior offense. See United States v. Vidaure, 861 F.2d 1337, 1340 (5th Cir. 1988) (determination of whether prior offense is a violent felony for purposes of § 924(e) does not involve examination of particular defendant's conduct).

(1) We therefore conclude that when considering whether a prior conviction falls within the categories of property crimes specifically mentioned in subsection (ii), the trial court must limit its inquiry to the fact of conviction and whether the prior offense, as denominated by the statute, comes within one of those categories of offenses.

Our interpretation of the multiple offender statute implies that those convicted of similar crimes in different states may be treated differently if the states denominate the crimes differently. This apparent anomaly is, however, a necessary incident to a statute that varies punishment on the basis of past convictions, and on the basis of the character of the crimes for which the defendant was convicted, rather than on the basis of the defendant's specific behavior. As the text of the statute makes clear, Congress determined that it would be most practical to assess sentences on the basis of past convictions, rather than on the basis of underlying behavior. By deferring to state convictions and state law characterizations of offenses, Congress favored administrative practicality over uniformity. We have no warrant to re-weigh this choice.

In any event, if the various state statutes defining burglary are not entirely congruent, neither are they entirely divergent. States do not arbitrarily denominate crimes "burglary." Rather, the names of the crimes reflect a general understanding of the crime, a common ground that will soften the uneven impact of the federal repeat offender statute.

An additional circumstance reduces any disparities. A prior burglary conviction qualifies as a "violent felony" for purposes of sentence enhancement only if the conviction was for a "felony" that is "punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 924(e)(2)(B). This limitation will preclude sentence enhancement based upon petty offenses that the state denominates burglary. For example, Tex - as recognizes as an offense "Burglary of Coin-Operated or Coin Collection Machines." See Tex. Penal Code

Ann. § 30.03 (Vernon 1989). This offense, however, is not a felony. It is a Class A misdemeanor. Id. at § 30.03(c). As such, it does not come within § 924(e)(2)(B)'s definition of "violent felony."

Our holding today is in no respect inconsistent with that of the Fourth Circuit in United States v. Headspeth, 852 F.2d 753 (4th Cir. 1988). In Headspeth, the court held that a state offense not denominated "burglary" is not burglary within the meaning of § 924(e)(2)(B)(ii) unless the state offense fits within the common law definition of burglary. We, unlike the Headspeth court, deal with an offense denominated "burglary" by the state of Texas. Headspeth is distinguishable.

Headspeth involved a prior conviction for "storehouse breaking," an offense similar to burglary, but not so defined by the Maryland statute.[4] The court considered whether that

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[4]Maryland defines "storehouse breaking"

prior conviction could serve as the basis for sentence enhancement on grounds that it was a form of "burglary" within the meaning of subsection (ii). The court found that since § 924(e) did not define the term "burglary," it was bound by the canon of interpretation that when Congress uses a common law term and does not otherwise define it, the presumption is that Congress intended to adopt the meaning of the term at common law. Headspeth, 852 F.2d at 757 (citing Morissette v. United States, 342 U.S. 246 263, 72 S.Ct. 240, 249-50, 96 L.Ed. 288 (1952)).

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as "breaking [into] a storehouse, filling station, garage, trailer, cabin, diner, a warehouse or other outhouse or into a boat in the day or night with an intent to commit murder or felony therein, or with the intent to steal, take or carry away the personal goods of another of the value of $300 or more therefrom . . . ." Md. Ann. Code art. 27, § 32 (1987).

An earlier version of the statute,[5] 18 U.S.C. § 1202(a), resting sentence enhancement on prior convictions for robbery or burglary, contained a broad definition of burglary.[6] When Congress amended the statute in 1986 to expand the list of predicate offenses to "violent felonies" and "serious drug offenses," it retained burglary as a predicate

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[5]The provisions contained in § 924(e)(1) were previously codified at 18 U.S.C. App. § 1202(a), which prohibited previously convicted felons form receiving, possessing, or transporting in commerce, or affecting commerce, any firearm. Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. 90-351, § 1202(a), 82 Stat. 197, 236 (1968). In 1984, Congress amended Section 1202(a), adding an increased penalty for felons with three previous convictions for robbery or burglary who subsequently possessed firearms. Armed Career Criminal Act of 1984, Pub.L. 98-473, § 1202(a), 98 Stat. 2185 (1985). In 1986, Congress repealed § 1202(a). The Armed Career Criminal Act was then amended and recodified at 18 U.S.C. § 924(e), as part of a general consolidation of the federal firearms laws. Firearms Owners' Protection Act, Pub.L. No. 99-308, 100 Stat. 456 (1986).

[6]The Act defined burglary as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in

offense but deleted the broad definition of that term present in the former statute. 18 U.S.C. § 924(e). The Fourth Circuit concluded that Congress' failure to define burglary in the amended statute, when viewed in light of earlier proposals aimed at removing burglary from the list of predicate offenses altogether, indicated Congress' intent "to revert to the narrow common law definition of burglary in the amended statute." Headspeth, 852 F.2d at 758. The court found this common law definition more compatible with subsection (ii)'s "focus on conduct which poses a serious potential risk of injury to the person." Id. The court then held that Headspeth's prior conviction for "storehouse breaking" did not come within the common law definition of burglary.

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conduct constituting a Federal or State offense. 18 U.S.C. App. § 1202(c)(2) (repealed).

In considering whether Headspeth's prior offense for "storehouse breaking" could nevertheless serve as the basis for sentence enhancement under § 924(e), the court proceeded to determine whether "storehouse breaking" was a crime which, under subsection (ii), "otherwise involves conduct that presents a serious potential risk of physical injury to another." Id. at 758-59. The court found that this clause of subsection (ii) must be limited to "offenses, which, as defined, pose by their very nature a serious potential risk of injury to another." Id. at 759 (emphasis in original). It concluded that while "[w]hile particular instances of storehouse breaking may, on occasion, present some risk of injury to a person, the crime itself is not one which, like common law burglary . . . poses such a risk by its very nature. Id. at 758-59 (emphasis in original).[7]

[7]The conduct underlying this offense may

The Fourth Circuit's conclusion that, in considering prior offenses for sentence enhancement under § 924(e)(2)(B)(ii), the court must limit its inquirey to the nature of the prior offense as defined in the statute is completely consistent with our decision. It is true that some of its language, equating the statutory reference to "burglary" in § 924(e)(2)(B)(ii) with the common law definition of burglary, is arguably contrary. The Fourth Circuit, however, never addressed the problem confronting us today: whether or not § 924(e)(2)(B)(ii)'s reference to burglary encompasses a crime which the state denominates "burglary" but which falls outside the scope of the common law crime of burglary.

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well have been found to involve the potential for physical injury to others, since Headspeth had thrown a brick through the plate glass window of a jewelry store in committing the crime.

The Eleventh Circuit recently addressed precisely this issue, and rejected the conclusions implied by the Headspeth court. United States v. Hill, 863 F.2d 1575 (11th Cir. 1989). After an exhaustive inquiry into the legislative history of § 924(e), the Eleventh Circuit concluded that the various proposals differed only as to the extent Congress should expand the predicate offenses. Id. at 1581. The court criticized the Fourth Circuit's decision in Headspeth, concluding that "[i]t would be odd indeed to conclude from this desire to expand the predicate offenses that Congress somehow intended to revert to the common law definition of burglary when that definition was never once mentioned in the legislative history of the act." Id. In addition, the court noted that since most states had abandoned the old common law definition of burglary, it was unlikely that Congress intended a meaning for burglary

that "is little more than an historical anomaly today." Id. at 1582.[8] The court concluded that any burglary within the definition of the prior act would be burglary within the meaning of § 924(e)(2)(B)(ii). The Hill court did not indicate how it would consider burglaries that did not come within the definition of the prior act.

(2) We conclude that a conviction for a crime which the state denominates "burglary" is a conviction for burglary within the meaning of § 924(e)(2)(B)(ii). The sentencing court need not inquire into the elements of the state law offense, or into the particular behavior underlying the defendant's conviction. Every circuit squarely confronting this issue has so held, and we agree. Leonard was convicted of crimes which Texas denominates "burglary." We therefore

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[8]The court noted that some twenty-six states, including Texas, have abandoned the common law definition of burglary in favor of one that varies the degree of the offense

find no error in the trial court's decision to enhance Leonard's sentence based on these prior burglary convictions.

III.

Leonard finally argues that § 924(e) is an unconstitutional ex post facto law. U.S. Const. art. I, § 9, cl. 3. He claims that Congress' enactment of § 924(e)(2)(B) in 1986 retrospectively defined his prior burglary convictions as "violent felonies" when "neither his conduct nor his convictions ha[d] such a character under Texas law."

(3,4) An ex post facto law is a criminal or penal measure which is retrospective and is disadvantageous to the offender because it may impose greater punishment. Weaver v. Graham,

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according to the nature of the structure, whether it was occupied, and/or whether force of injury was threatened. Five states make no such distinctions, and five other states have retained the common-law definition of burglary. Fourteen states were not surveyed. Hill, 863 F.2d at 1582 n. 5.

450 U.S. 24, 28-29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981); Dobbert v. Florida, 432 U.S. 282, 292-93, 97 S.Ct. 2290, 2297, 53 L.Ed.2d 344 (1977). Leonard's argument reflects a misunderstanding as to the function of his burglary convictions under the statute. Neither his conviction nor the sentence he complains of punishes him for those prior offenses. Those offenses merely led to an enhanced sentence for his new crime. Leonard pled guilty to violating § 922(g)(1) on May 26, 1988, after the effective date of § 924(e)(1). Section 924(e) is not retrospective because it bases enhancement of his sentence upon convictions which preceded its enactment.

In Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948), the Supreme Court rejected the argument that a recidivist statute operated retroactively as an ex post facto law simply because the offense that gave

rise to the accused's status as a habitual offender occurred prior to the effective date of the recidivist statute.

The Court Explained:

> The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.

334 U.S. at 732, 68 S.Ct. at 1258.

Accordingly, we find that § 924(e) does not violate the Constitution's prohibition against ex post facto laws.

For the reasons stated above, we affirm the enhanced sentence imposed by the trial court under § 924(e).

AFFIRMED.

Supreme Court, U.S.
FILED
JUL 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1885

In the Supreme Court of the United States

OCTOBER TERM, 1989

MITCHELL RAY LEONARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the offenses of first and second degree burglary under Texas law are "violent felon[ies]" under the sentence enhancement provision of 18 U.S.C. 924(e)(1) and 924(e)(2)(B)(ii) (Supp. V 1987).

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MITCHELL RAY LEONARD, PETITIONER

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 868 F.2d 1393.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1989. The petition for a writ of certiorari was filed on May 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was indicted in the Western District of Texas on one count of possession of two firearms by a previously convicted felon, in violation of 18 U.S.C.

922(g)(1) (Supp. V 1987).[1] In the district court, the government filed a pretrial "notice of intent to seek an enhancement of sentence." The notice advised petitioner that since his criminal record included two previous convictions for second degree burglary under Texas state law and one previous Texas conviction for first degree burglary,[2] he was subject to the enhanced sentence of 15 years' imprison-

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[1] The indictment also specifically charged petitioner with three previous state convictions for burglary, thus subjecting him to the enhanced sentence of 15 years' imprisonment under 18 U.S.C. 924(e)(1) (Supp. V 1987). In response to petitioner's motion, however, the district court dismissed the portion of the indictment alleging a violation of Section 924(e), since that statute is only a sentence enhancement provision. Pet. App. A2; Gov't C.A. Br. 2-3.

[2] Texas state law generally defines burglary as follows:

> A person commits an offense if, without the effective consent of the owner, he:
>
> (1) enters a habitation, or a building * * * not then open to the public, with intent to commit a felony or theft; or
>
> (2) remains concealed, with intent to commit a felony or theft, in a building or habitation; or
>
> (3) enters a building or habitation and commits or attempts to commit a felony or theft.

Tex. Penal Code Ann. § 30.02(a) (Vernon 1974). Under Texas state law, the offense is second degree burglary unless the offense involves one of the following facts, in which case the offense is first degree burglary:

> (1) the premises are a habitation; or
>
> (2) any party to the offense is armed with explosives or a deadly weapon; or
>
> (3) any party to the offense injures or attempts to injure anyone in effecting entry or while in the building or in immediate flight from the building.

Tex. Penal Code Ann. § 30.02(d) (Vernon 1974).

ment under 18 U.S.C. 924(e)(1) (Supp. V 1987). Gov't C.A. Br. 2-3; Pet. App. A2.[3]

Petitioner was convicted on a plea of guilty. At the sentencing hearing, the government and petitioner stipulated to petitioner's three Texas burglary convictions. Gov't C.A. Br. Add. A, at 1-2.[4] Petitioner contended, however, that his burglary convictions were not proper predicate offenses under Section 924(e)(1) because those crimes did not involve actual or potential injury to others. Pet. C.A. Br. 11-12, 15-16. The district court rejected that argument and sentenced petitioner to an enhanced term of 15 years' imprisonment under Section 924(e)(1). Pet. App. A3.

---

[1] The sentence enhancement provision of 18 U.S.C. 924(e)(1) applies to previously convicted felons who possess or receive a firearm in violation of 18 U.S.C. 922(g). Title 18, United States Code, Section 924(e)(1), provides in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years * * *.

Title 18, United States Code, Section 922(g)(1), refers to any "convict[ion] in any court of a crime punishable by imprisonment for a term exceeding one year."

Title 18, United States Code, Section 924(e)(2)(B), provides:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that –
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

[4] Petitioner had two previous convictions for burglary of a "building" (second degree burglary) and one previous conviction for burglary of a "habitation" (first degree burglary). Gov't C.A. Br. Add. A, at 1-2; see note 2, *supra*.

2. The court of appeals affirmed. Pet. App. A1-26. Petitioner argued on appeal (Pet. C.A. Br. 8-12, 15-18; Pet. C.A. Reply Br. 5-9) that Section 924(e) applies only to offenses that involve a serious potential risk of physical injury to another. The court of appeals rejected that argument, concluding that the "plain language of [Section 924(e)(2)(B)(ii)] reflects Congress' determination that [burglary] present[s] an inherent risk of violence" (Pet. App. A7); see *id.* at A8-A9 (citing *United States* v. *Portwood,* 857 F.2d 1221 (8th Cir. 1988), cert. denied, 109 S. Ct. 2073 (1989); *United States* v. *Dickerson*, 857 F.2d 414 (7th Cir. 1988), cert. denied, 109 S. Ct. 1753 (1989)). As the court explained, petitioner's "construction of the statute * * * renders superfluous the language in the first clause of subsection (ii)" (Pet. App. A7). Thus, if it were necessary to show that a particular burglary involved a serious risk of physical injury in order to qualify as a "violent felony," it would not have been necessary for Congress to include within the definition of "violent felony" the crimes of "burglary, arson, or extortion." Turning to the proper interpretation of Section 924(e), the court held that "a conviction for a crime which the state denominates 'burglary' is a conviction for burglary within the meaning of § 924(e)(2)(B)(ii)" (Pet. App. A23).[5]

[5] The court of appeals considered its decision consistent with *United States* v. *Headspeth,* 852 F.2d 753 (4th Cir. 1988), since in that case the Fourth Circuit "held that a state offense *not* denominated 'burglary' is not burglary [under Section 924(e)] unless the state offense fits within the common law definition of burglary" (Pet. App. A16). *Headspeth* involved the Maryland state law offense of "storehouse breaking," while this case involved the Texas state law offense of "burglary" (Pet. App. A16-A17).

The court of appeals' effort to harmonize its decision with *Headspeth* is not persuasive. As we explain (see pp. 18-19, *infra*), the court's holding does conflict with the Fourth Circuit's judgment in *Headspeth*.

Accordingly, the court held that "[t]he sentencing court need not inquire into the elements of the state law offense, or into the particular behavior underlying the defendant's conviction" (Pet. App. A23).[6]

ARGUMENT

In this Court, petitioner for the first time contends (Pet. 25-40) that only those burglaries that satisfy the common law definition of burglary qualify as "violent felon[ies]" under the sentence enhancement provision of 18 U.S.C. 924(e)(1) and 924(e)(2)(B)(ii) (Supp. V 1987).[7] Petitioner further contends (Pet. 10-11, 14-40) that the courts of appeals have divided over the proper definition of the term "burglary" in Section 924(e)(2)(B)(ii), and that the decision below conflicts directly with recent decisions of the Fourth and Ninth Circuits. As we show below, the statutory reference to "burglary" is not limited to the common law definition of burglary. To the contrary, as the legislative history makes clear, Congress intended to retain the generic definition of burglary that was contained in the predecessor statute, the Armed Career Criminal Act of 1984, a definition that reflects the common view among the federal government and the States today, *i.e.*, that burglary consists of the unlawful entering of a building or residence belonging to another for the purpose of committing a federal or state offense.

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[6] The court of appeals, following *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948), also rejected petitioner's claim that Section 924(e) amounted to an unconstitutional ex post facto law. Pet. App. A24-A26.

[7] In the lower courts, petitioner consistently maintained that his burglary convictions were not proper predicate offenses under Section 924(e)(1) because those crimes did not involve actual or potential injury to others. See Pet. C.A. Br. 8-12, 15-18; Pet. C.A. Reply Br. 5-9.

Accordingly, although we disagree with the reasoning of the court of appeals, petitioner's three state burglary convictions do qualify as "violent felon[ies]" under Section 924(e). Petitioner was therefore properly subjected to the sentence enhancement provision. Furthermore, although petitioner correctly points out that the courts of appeals have adopted different constructions of Section 924(e), we do not think that this is the appropriate case in which to resolve the conflict since petitioner failed to press in the lower courts the issue that has actually divided the circuits—whether burglary under Section 924(e) is limited to its common law definition.[8]

1. Petitioner contends (Pet. 25-40) that only those burglaries that satisfy the common law definition of burglary qualify as "violent felon[ies]" under the sentence enhancement provision of 18 U.S.C. 924(e)(1) and 924(e)(2)(B)(ii).[9] As most courts of appeals have concluded, however, the statutory reference to "burglary" is not limited to the common law definition of burglary.[10]

---

[8] Petitioner also renews his contention (Pet. 41-43) that Section 924(e) amounts to an unconstitutional ex post facto law. That claim is groundless in light of this Court's holding in *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948), that a recidivist statute does not violate the Ex Post Facto Clause where the offense giving rise to the accused's status occurred before the effective date of that statute.

[9] At common law, the offense of burglary consisted of "the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.13, at 464 (1986).

[10] See, *e.g.*, *United States* v. *Dombrowski*, No. 88-2545 (7th Cir. June 7, 1989), slip op. 9-20; *United States* v. *Palmer*, 871 F.2d 1202, 1204-1209 (3d Cir. 1989); *United States* v. *Hill*, 863 F.2d 1575, 1577-1582 (11th Cir. 1989); *United States* v. *Portwood*, 857 F.2d 1221, 1223-1224 (8th Cir. 1988), cert. denied, 109 S. Ct. 2073 (1989); but see *United States* v. *Chatman*, 869 F.2d 525, 527-530 (9th Cir. 1989)

a. The predecessor to Section 924(e), 18 U.S.C. App. 1202 (1982 & Supp. II 1984), was enacted as part of the Armed Career Criminal Act of 1984.[11] Under that provision, anyone in possession of a firearm who had "three previous convictions * * * for robbery or burglary, or both" would be "imprisoned [for] not less than fifteen years * * *." Congress enacted the Armed Career Criminal Act in order to provide more stringent punishment for recidivists. As Senator Specter, the sponsor of the Act, explained:

> The key to the Armed Career Criminal Act is the revelation that a surprisingly small number of criminals commit the vast majority of crimes. Studies reveal that six percent of the criminals arrested commit as much as 70% of the serious crime in this country. The statistic is startling, but the implication is evident: by targeting our resources on this six percent we can drastically reduce crime. This is what the * * * Act is all about * * *.

Armed Career Criminal Act: Hearings on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 17 (1984).

The statute further defined "burglary" in broad generic terms as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense" (18 U.S.C. App. 1202(c)(9)

(adopting common law definition of burglary); *United States* v. *Headspeth*, 852 F.2d 753, 756-758 (4th Cir. 1988) (same).

[11] Pub. L. No. 98-473, §§ 1801-1803, 98 Stat. 2185. The Armed Career Criminal Act was itself enacted as a part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976.

(Supp. II 1984)).[12] Senator Specter explained the inclusion of burglary as a predicate offense:

> Robberies and burglaries are the most damaging crimes to society. Robberies and burglaries occur with far greater frequency than other violent felonies, affect many more people, and cause the greatest losses. * * * Burglaries involve invasion of [innocent individuals'] homes or workplaces, violations of their privacy, and loss of their most personal and valued possessions. * * * Most robberies and burglaries are committed by career criminals * * * [who] often have no lawful employment; their fulltime occupation is crime for profit and many commit crimes on a daily basis. * * * Various studies also indicate that for every time a career criminal is arrested for robbery or burglary, he has probably committed 10 to 20 such crimes. Career criminals commit robberies and burglaries interchangeably.

H.R. Rep. No. 1073, 98th Cong., 2d Sess. 3 (1984) (citation omitted). By its terms, therefore, the broad statutory definition did not restrict "burglary" offenses to an archaic common law definition.[13]

---

[12] Section 1202(c)(2), in turn, defined "felony" as "any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less * * *."

[13] The Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, §§ 102, 104, 100 Stat. 451-453, 456-459, recodified 18 U.S.C. App. 1202 (1982 & Supp. II 1984), with only one minor change, as 18 U.S.C. 924(e) (Supp. V 1987). See *United States* v. *Headspeth*, 852 F.2d at 757 n.1. Congress retained the generic definition of burglary as consisting of entering and remaining surreptitiously within a building of another to engage in conduct constituting a federal or state offense. But unlike the predecessor statute, see note 12, *supra*, the new provision did not distinguish from felony burglary those state mis-

b. Enacted as part of the Anti-Drug Abuse Act of 1986, the Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, §§ 1401-1402, 100 Stat. 3207-39 to 3207-40, amended Section 924(e) by including additional predicate acts, such as certain "serious drug offenses." In enlarging the category of predicate acts, the 1986 Act also eliminated Section 924(e)'s definition of "burglary." All the evidence indicates, however, that Congress intended to retain the broad definition of burglary that existed before the latest amendment to the statute.

The Career Criminals Amendment Act of 1986 evolved out of three separate bills, two of which originated in the House of Representatives and one of which arose in the Senate. The Senate bill, S. 2312, 99th Cong., 2d Sess. (1986), and its companion bill in the House, H.R. 4639, 99th Cong., 2d Sess. (1986), defined a "crime of violence" as

> (A) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or
>
> (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 3 (1986) (reporting text of S. 2312) [hereinafter *Senate Hearing*]; *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d

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demeanor burglary offenses punishable by a prison term of two years or less.

Sess. 4 (1986) (reporting text of H.R. 4639) [hereinafter *House Hearing*].

Senator Specter, who introduced S. 2312, understood that the bill would "broaden th[e] definition [of career criminal] so that we may have a greater sweep and more effective use of this important statute" (*House Hearing* 44). On the Senate floor, Senator Specter stated that his bill would "broaden the so-called predicate crimes to include drug violations and certain other serious violent acts. This amendment would change the law by broadening the prior convictions which lead to the classification of being a 'career criminal.' " 132 Cong. Rec. 7697 (1986).[14]

The Senate hearings on Senator Specter's bill reveal a shared understanding that the bill would expand the scope of the Armed Career Criminal Act. No mention was made of adopting the more restrictive common law definition of burglary. Representative Wyden, the sponsor of the companion House bill, H.R. 4639, for example, explained that the Act, although successful to date, "would be much more effective if the predicate offenses were *extended beyond* robbery and burglary to include crimes of violence and serious drug offenses. That's precisely what the bill we recently introduced would do." *Senate Hearing* 6 (emphasis added); see *House Hearing* 10. And Deputy Assistant Attorney General Knapp observed that the Senate bill would "expand the coverage of the act" while retaining robbery and burglary as predicate offenses. *Senate Hear-*

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[14] Senator Specter also entered into the Congressional Record a letter from the Department of Justice, expressing the Department's understanding that the proposed amendment would expand the coverage of the Armed Career Criminal Act beyond (but still including) robbery and burglary. See Letter from Assistant Attorney General John R. Bolton to Senator Arlen Specter (Mar. 18, 1986), quoted in 132 Cong. Rec. 7698 (1986).

ing 9. "The term 'crime of violence' would include robberies and burglaries," he noted, "since both are felonies that by their nature involve a substantial risk that physical force against the person or property of another may be used in the course of committing them." *Ibid.*

In addition to H.R. 4639, the House considered H.R. 4768, a similar bill sponsored by Representatives Hughes and McCollum that also expanded the predicate offenses for the Armed Career Criminal Act. Like H.R. 4639, the Hughes/McCollum bill expanded the predicate crimes by introducing the two broad categories of "violent felony or a serious drug offense." That bill defined "violent felony" as "any State or Federal felony that has as an element the use, attempted use, or threatened use of physical force against the person of another." *House Hearing* 6. On its face, this bill appeared to focus on the actual use of force against the person of another. The House hearings, however, show that the bill's sponsors understood that its purpose, like that of the Senate bill and its House companion, was "to expand [the Armed Career Criminal Act], which now covers burglary and robbery, to include other serious violent crimes." *House Hearing* 7 (remarks of Rep. McCollum).

Deputy Assistant Attorney General Knapp also testified at the House hearings and reiterated the Justice Department's view that "one of the critical standard categories involve[s] people with a long history of burglary convictions, because in fact your typical career criminal is most likely to be a burglar * * *. That is probably the No. 1 professional crime." *House Hearing* 26. He also commented that

> even though injury is not an element of [burglary], it is a potentially very dangerous offense, because when you take your very typical residential burglary or even

> your professional commercial burglary, there is a very serious danger to people who might be inadvertently found on the premises. Many crimes of violence do occur in the course of committing a burglary. It is something which is clearly a foreseeable risk, and for that reason is always included in any typical felony murder statute.

House Hearing 26.

Deputy Assistant Attorney General Knapp and others expressed concern that H.R. 4768, as drafted, did not necessarily include property crimes such as burglary in its definition of "violent felony," since that definition limited "violent felony" to offenses involving "use of physical force against the person of another" (H.R. 4768, 99th Cong., 2d Sess. (1986), quoted at *Housing Hearing* 6); see *House Hearing* 15. But Representative Hughes, the Chairman of the House Subcommittee on Crime, responded to those concerns at the conclusion of the hearings:

> Frankly, I think on the question of burglaries, I can see the arguments both ways. We have already included burglaries.
>
> My leanings would be to leave it alone; it is in the existing law; it was the existing statute. We can still be specific enough. We are talking about burglaries that probably are being carried out by an armed criminal, because the triggering mechanism is that they possess a weapon. That triggers Federal jurisdiction to begin with. So we are not talking about the average run-of-the-mill burglar necessarily, we are talking about somebody who also illegally possesses or has been transferred a firearm.

House Hearing 41. The other members of the Subcommittee concurred in this view, and agreed to "develop some language to do that" (*ibid.*).

As a result of the hearings, the House Subcommittee on Crime ultimately reported out a clean bill, H.R. 4885, 99th Cong., 2d Sess. (1986). See H.R. Rep. No. 849, 99th Cong., 2d Sess. 6-7 (1986). H.R. 4885 provided in relevant part:

> (B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year that –
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) involves conduct that presents a serious potential risk of physical injury to another.

H.R. Rep. No. 849, *supra*, at 7. Subsection (B)(ii) presumably is the language the House Subcommittee "develop[ed]" to cover burglary as it was defined in "the existing statute" (*House Hearing* 41).

The report of the House Judiciary Committee accompanying H.R. 4885 confirms this point. Indeed, that report makes clear that the bill's principal purpose was to expand the reach of the Armed Career Criminal Act; the report clearly contemplated that the proposed amendments would continue to cover those burglaries included within the ambit of the predecessor statute. As the House Judiciary Committee explained:

> The Subcommittee on Crime held a hearing on May 21, 1986 to consider whether *it should expand* the predicate offenses (robbery and burglary) in existing law in order to add to its effectiveness. At this hearing a consensus developed in support of *an expansion* of the predicate offenses to include serious drug trafficking offenses under both State and Federal law and violent felonies, generally. *This concept was encompassed in H.R. 4885 by deleting the specific predicate*

> *offenses for robbery and burglary* and adding as predicate offenses State and Federal laws for which a maximum term of imprisonment of 10 years or more is prescribed for [certain drug offenses] and violent felonies under Federal or State law if the offense has [as] an element the use, attempted use or threatened use of physical force against a [person]. * * *
>
> The other major question involved in these hearings was as to what violent felonies involving physical force against [property] should be included in the definition of "violent" felony. *The Subcommittee agreed to add the crimes punishable for a term exceeding one year that involve conduct that presents a serious potential risk of physical injury to others. This will add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person.*

H.R. Rep. No. 849, *supra*, at 3 (emphasis added).

c. In sum, Congress intended that burglary, as defined under the predecessor Armed Career Criminal Act, would continue to serve as a predicate offense. And to eliminate any confusion in this regard, Congress inserted the term "burglary" into the definition of "violent felony" before passing the Anti-Drug Abuse Act of 1986. See Section 924(e)(2)(B)(ii); 132 Cong. Rec. H9495 (daily ed. Oct. 8, 1986).

Contrary to petitioner's contention (Pet. 26-31), the legislative history, as detailed above, does not suggest that Congress restricted the definition of "burglary" to its common law definition. Instead, it makes clear that "Congress intended that any burglary that would have met the definition of burglary under the previous act would fall within

the meaning of burglary" under the amended statute. *United States* v. *Hill*, 863 F.2d 1575, 1582 (11th Cir. 1989).

Here, petitioner's state burglary convictions qualify as predicate offenses under Section 924(e), since those crimes necessarily involved entering or remaining surreptitiously within a building of another with the intent to commit a federal or state offense. See Tex. Penal Code Ann. § 30.02 (Vernon 1974); note 2, *supra*. Accordingly, petitioner was properly sentenced under the enhancement provision of 18 U.S.C. 924(e)(1) and 924(e)(2)(B)(ii).

2. Petitioner correctly points out (Pet. 10-11, 14-40) that the courts of appeals have adopted different constructions of Section 924(e). The actual conflict, however, does not concern the issue petitioner pressed before the district court and the court of appeals, namely, whether Section 924(e) applies only to burglaries that pose a potential risk of physical injury. Rather, the courts have disagreed over the separate issue whether the statute includes only those burglaries that would be treated as such under common law, *i.e.*, the "breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." 2 W. LaFave & A. Scott, *Substantive Criminal Law*, § 8.13 at 464 (1986).

a. To date, three courts of appeals have agreed with our position that Congress fully intended to retain in the Career Criminals Amendments Act of 1986 the broad definition of burglary that was contained in the original version of Section 924(e). In so concluding, those courts have rejected the view that the statutory reference to "burglary" is limited to the common law definition of that crime. *United States* v. *Dombrowski*, No. 88-2545 (7th Cir. June 7, 1989), slip op. 19-20; *United States* v. *Palmer*, 871 F.2d 1202, 1204-1209 (3d Cir. 1989); *United States* v. *Hill*, 863 F.2d at 1582. Thus, after surveying the legislative

history detailed above, the Eleventh Circuit correctly noted that "the purpose of the 1986 amendments to section 924(e) was to expand the predicate offenses, not restrict them." *United States* v. *Hill*, 863 F.2d at 1581; see *United States* v. *Palmer*, 871 F.2d at 1208. Those three circuits have consequently held that "the term 'burglary' must be given the generic definition that explicitly existed prior to its amendment." *United States* v. *Palmer*, 871 F.2d at 1208; accord *United States* v. *Dombrowski*, slip op. 19-20 ("we think [Congress's] intent was to carry forward the prior definition—even if not explicitly stated"); *United States* v. *Hill*, 863 F.2d at 1582.[15]

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[15] As the Eleventh Circuit correctly noted, "even if the legislative history were not as clear as we believe it to be, [the court] would be reluctant to conclude that Congress intended to use a definition of burglary that has become an anachronism." *United States* v. *Hill*, 863 F.2d at 1582. When a common law term has evolved beyond its common law meaning, courts should apply the "ordinary, contemporary, common meaning," and not the antiquated notions of early common law. *Perrin* v. *United States*, 444 U.S. 37, 42 (1979) (bribery under Travel Act, 18 U.S.C. 1952, not confined to common law definition). Thus, in concluding that the offense proscribed in 18 U.S.C. 2113(b) is not limited to common law larceny, the Court stated:

> We cannot believe that Congress wished to limit the scope of the [statute's] coverage, and thus limit its remedial purpose, on the basis of an arcane and artificial distinction more suited to the social conditions of 18th-century England than the needs of 20th-century America.

Bell v. *United States*, 462 U.S. 356, 362 (1983); see also *Burns* v. *Alcala*, 420 U.S. 575, 580-581 (1975).

Texas and the vast majority of other States have long since abandoned the strict common law definition in their burglary statutes. See *United States* v. *Hill*, 863 F.2d at 1582 n.5 (noting that only five of 36 States surveyed retained common law definition of burglary). The Model Penal Code reflects this development, defining burglary as follows:

> A person is guilty of burglary if he enters a building or oc-

b. Joining the Third, Seventh, and Eleventh Circuits, the court of appeals here concluded that the statutory reference to "burglary" is not limited to the common law definition of burglary (Pet. App. A16-A23). But in rejecting the strict common law definition, the Fifth Circuit appears to have articulated a different construction of Section 924(e). It has concluded that the statute applies to any felony defined as "burglary" under state law. See Pet. App. A23; *United States* v. *Taylor,* 864 F.2d 625, 627 (8th Cir. 1989) (" 'burglary' in the sentence enhancement statute means 'burglary' however a state chooses to define it"), petition for cert. pending, No. 88-7194. To the extent the Fifth and Eighth Circuits expand the definition of Section 924(e) beyond that contained in the predecessor statute and suggest that the previous *federal* definition of burglary contained in the Firearms Owners' Protection Act and the Armed Career Criminal Act of 1984 does not control, we disagree for the reasons stated above (see pp. 6-14, *supra*). Nevertheless, it is clear that petitioner's burglary convictions qualify as predicate crimes under the rationale espoused by the Fifth and Eighth Circuits.

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cupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.

Model Penal Code § 221.1 (Proposed Official Draft 1962). Indeed, as one commentator has noted, "[o]f all common law crimes, burglary today perhaps least resembles the prototype from which it sprang." Note, *Statutory Burglary – The Magic of Four Walls and a Roof,* 100 U. Pa. L. Rev. 411 (1951). Moreover, specific statutes creating federal crimes of burglary, such as 18 U.S.C. 2113(b) and 18 U.S.C. 2118(b) (Supp. V 1987), do not restrict the offense to its common law boundaries. Accordingly, it defies both logic and common sense to attribute to Congress an intent to adopt a common law concept that has been rejected by virtually every State and by Congress in Title 18 as well.

In addition, neither the Fifth Circuit here nor the Eighth Circuit has expressly rejected the position that Section 924(e) incorporates its predecessors' definition of burglary. Indeed, the state burglary statutes actually followed in these cases are entirely consistent with the federal definition of burglary contained in the Armed Career Criminal Act and the Firearms Owners' Protection Act (see pp. 7-8 & notes 12-13, *supra*). See Pet. App. A2-A3 (burglaries of "habitation" and "building," Tex. Penal Code Ann. § 30.02 (Vernon 1974)); *United States* v. *Taylor,* 864 F.2d at 626 (burglaries of "building or inhabitable structure," Mo. Rev. Stat. § 569.170.1 (1979)). For those reasons, as well as for the reason that petitioner does not even raise the issue, this case is not a suitable vehicle for resolving that apparent inconsistency among the courts of appeals.[16]

c. On the other hand, the Fourth and Ninth Circuits have concluded that Section 924(e) includes only those burglaries that meet the strict common law definition. *United States* v. *Chatman*, 869 F.2d 525 (9th Cir. 1989);

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[16] In *United States* v. *Patterson,* No. 88-1497 (Apr. 26, 1989), vacated on other grounds (May 17, 1989), the First Circuit declined to apply the former generic definition of burglary to determine whether two breaking and entering convictions under Massachusetts state law qualified as "violent felon[ies]" under Section 924(e). The court of appeals stated that "[w]e frankly cannot divine how Congress intended to define burglary," but then added that "[t]he deliberate omission of the 1984 definition effectively nullifies the intent of Congress, exposed in the legislative history, to define burglary in broad generic terms" (slip op. 12). For the reasons set forth above (see pp. 6-14, *supra*), we disagree with the First Circuit's analysis of Section 924(e). Nevertheless, in *Patterson* the First Circuit ultimately held that the Massachusetts breaking and entering convictions fell within Section 924(e)(2)(B)(ii)'s catch-all phrase defining violent felony as any "conduct that presents a serious potential risk of physical injury to another." See slip op. 12-13.

United States v. *Headspeth*, 852 F.2d 753 (4th Cir. 1988). In our view, those decisions have misconstrued Congress's intent when it reinserted the predicate offense of "burglary" in Section 924(e).

Both the Ninth and the Fourth Circuits have misread the pertinent legislative history, placing determinative weight on the fact that one of the House bills, H.R. 4768, limited the definition of "violent felony" to crimes involving "the use, attempted use, or threatened use of physical force against the person of another." See *United States* v. *Chatman*, 869 F.2d at 527-528; *United States* v. *Headspeth*, 852 F.2d at 757-758. But both courts of appeals have ignored the fact that the sponsor of H.R. 4768 determined at the conclusion of the hearings that "burglary," as previously defined, should be *retained* as a predicate offense. Indeed, the members of the Subcommittee on Crime specifically agreed to "develop some language" to do so (*House Hearing* 41), an express determination noted in the House Judiciary Committee's report on the final House bill, H.R. 4885. See H.R. Rep. No. 849, *supra*, at 2-3, 5; *United States* v. *Dombrowski*, slip op. 17.

3. As petitioner correctly points out (Pet. 10-11, 14-40), the court of appeals' decision, together with the other circuits' decisions described above, squarely conflict with the construction of Section 924(e) adopted by both the Fourth and Ninth Circuits. Nevertheless, this case is not an appropriate vehicle for the Court to resolve this issue on which the lower courts are divided.

Petitioner did not base his argument in the court of appeals on the issue that has divided the circuits. Petitioner did not argue that his burglary convictions should not be counted against him because those crimes do not fall within the common law definition of "burglary." Instead, in both the district court and the court of appeals, peti-

tioner argued that Section 924(e) applies only to burglaries that pose a potential risk of physical injury. See Pet. App. A2-A5; Pet. C.A. Br. 8-12, 15-18; Pet. C.A. Reply Br. 5-9. And on that issue, there is no disagreement among the lower courts.[17] As a result, petitioner failed to press below the only issue under Section 924(e) on which the courts of appeals are divided.[18]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1989

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[17] No court of appeals has agreed with that reading of the statute. Even those courts that have adopted the restrictive common law definition of the term burglary have not in any way suggested that the particular offense must involve a risk of physical injury. Thus, even if petitioner continued to press the argument here, review by this Court would be premature until a court has adopted that construction of the statute.

[18] *Carter* v. *United States*, No. 88-7307, squarely raises the issue that has divided the lower courts, *i.e.*, whether Section 924(e) includes only those burglaries that would be treated as such under common law. Since that case is an appropriate vehicle to resolve the conflict, the United States has agreed with petitioner in *Carter* that the Court should grant certiorari.

U.S. GOVERNMENT PRINTING OFFICE 1989—241 699/00335

Supreme Court, U.S.
FILED
JUL 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1885

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MITCHELL RAY LEONARD, PETITIONER

V.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF ON MOTION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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PETITION FOR CERTIORARI
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

MITCHELL RAY LEONARD, PETITIONER

v.

UNITED STATES OF AMERICA

PETITIONER'S RESPONSE ON A
WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

We have argued that Petitioner is entitled to Certiorari review in order to determine if 18 U.S.C. 924(e) was appropriately applied to him in this matter. At least three separate definitions of "burglary" are presently in use among the various Circuit Courts. At least two cases have suggested that the state law definition should be controlling.[1] Two have argued that the

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[1]See United States v. Portwood, 857

common law definition of burglary is appropriate given the manner that the statute was drafted.[2] While three others have held that a definition broader than that found at common law should be adopted for application of Section 924(e).[3] We have argued that this conflict among the Circuit Courts provides a proper basis for United States Supreme Court review. Review on this issue was not ripe until this matter entered the Supreme Court arena because such an argument would have no merit at

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F.2d 1221 (8th Cir. 1988); United States v. Dickerson, 857 F.2d 414 (7th Cir. 1988).

[2]See United States v. Chatman, 869 F.2d 525 (9th Cir. 1989); United States v. Headspeth, 852 F.2d 753 (4th Cir. 1988).

[3]See United States v. Dombrowski, No. 88-2545 (7th Cir. June 7, 1989, slip op. 19-20); United States v. Palmer, 871 F.2d 1202 (3rd Cir. 1989); United States v. Hill, 863 F.2d 1575 (11th Cir. 1989).

that Intermediate Appellate Court stage. We would urge that the Court adopt this common law criteria as the appropriate definition in this matter.

The Respondents argue that Petitioner should have raised the issue of whether "burglary" under Section 924(e) is limited to its common law definition at an earlier stage in these proceedings and that by failing to do so, Petitioner has waived resort to this argument. Petitioner would argue in response that this issue was not ripe at the time of the Fifth Circuit Appeal. The decision in United States v. Chatman, 869 F.2d 525 (9th Cir. 1989) adopting the common law definition as the appropriate definition for sentence enhancement pursuant to Section 924(e) had not been rendered at

the time that Petitioner's Fifth Circuit Reply Brief was filed.[1] Petitioner would therefore argue that recent case decisions provide Petitioner with the opportunity to raise this issue and bring it forth at this time. Furthermore, as respondent raised the issue of the Headspeth precedent in their Fifth Circuit Brief, they cannot assert that they are surprised by this issue at this time. Furthermore, the rules and procedures of the Supreme Court clearly recognize the ability of both Petitioners and Respondents to bring forth new cases and new arguments even during the actual Certiorari proceedings. Therefore, we would respectfully request that the Court accept this matter for consideration. We

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[1]Indeed, the decision would not be rendered until four months later. While Petitioner concedes that the United States v. Headspeth, 852 F.2d 753 (4th

contend that an argument based upon diversity of opinion among the Circuits is appropriately presented in a Writ to the Supreme Court.

Respondent's argument that this case does not present an appropriate vehicle for review should fail because an argument based upon diversity among the Circuits would not be ripe at the Intermediate Appellate stage. The Intermediate Appellate Court has no means of remedying divergent application of Section 924(e). Only at the Supreme Court level can this diversity be

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Cir. 1988) precedent was available at the time that Fifth Circuit Brief's were submitted, that lone precedent was not significantly compelling at that time. The combination of the Headspeth and Chatman cases do appear to provide sufficient precedent to suggest that a reviewable conflict exists at this time.

addressed. This is why at the Intermediate Appellate stage Petitioner's arguments addressed what definition of burglary should be properly applied to him, rather than concentrating on diversity among the Circuits. Making such an argument at the Intermediate Appellate level is inappropriate and taxing judicial economy.

We would argue that perhaps the best explanation for the divergence in opinions among the Circuits centers around the actual fact situations involved in each of these circumstances. We would point out that in those circumstances where the facts presented criminals whose sentences enhancement was based on less violent or less criminal activity, those courts have held that a

common law definition should be applied. In those instances, those courts were attempting to apply the statute as it was worded in order to include within its gamut only those individuals who were the sort of violent habitual offenders actually anticipated by the Congressmen who enacted the statute. By strictly adhering to the language of the statute, they were adopting an "equity" interpretation.

The Fourth Circuit, in United States v. Headspeth, 852 F.2d 753, 765 (4th Cir. 1988), considered whether a defendant's prior convictions for storehouse breaking constituted burglary as contemplated by Section 924(e). The Fourth Circuit held that this offense was not of the seriousness or violence sufficient to

support sentence enhancement. The court noted that:

> Quite plainly, this offense is not the sort of "violent felony" referred to in § 924(e)(2)(B)(i), for it does not have as an element the use - actual, attempted, or threatened - of force against the person.

The Ninth Circuit, in United States v. Chatman, 869 F.2d 525, 528 (9th Cir. 1989), concluded that the overwhelming impression created by 924(e) indicated that "Congress intended 'burglary' to be a crime of particular danger to the person, and not to include all of the common property offenses that states might choose to denominate as burglary." This case held that "auto burglary" was not sufficient to sustain sentence enhancement pursuant to the Armed Career Criminals Act. The Chatman court went on to note that:

> [B]y leaving the term 'burglary undefined, Congress intended it to have its common law meaning. "Burglary" therefore means the breaking and entering of the dwelling house of another, in the nighttime, with the intent to commit a felony therein.
> Chatman, supra at 527.

We would urge the Court to adopt the Ninth and Fourth Circuit interpretation of Section 924(e). We believe that these precedents most closely resemble the sentencing history of Petitioner. Therefore, we would argue that this result is the most just, equitable and results in applying 924(e) in the matter intended by Congress.

Although the United States and Petitioner agree that the questions raised by Petitioner's Writ of Certiorari are important and far-reaching, the United States argues that Certiorari should be

denied in this matter and granted in another where no written Intermediate Appeals opinion is available. Petitioner respectfully disagrees with the rationale and the conclusions of the Respondents. We argue that this matter presents the court with a unique opportunity to delineate the boundaries for application of Section 924(e) and to clear up the confusion surrounding the use of the statute. Defining both the quotient of "violence" necessary to violate the statute and the elements of burglary necessary to violate the statute are important to ensure equal application of Section 924(e) among the Circuits. We feel that the nature of Petitioner's offenses and the circumstances surrounding Petitioner's enhancement require

review because it is our sincere belief that this statute does not and should not encompass offenses of the nature committed by Petitioner.

Respondent's argue in their Brief in Opposition that the "broad statutory definition did not restrict 'burglary' offense to an archaic common law definition." See Brief for the United States in Opposition at 8. However, the definition cited by Respondent's in the Footnote to this argument also fails to encompass the activity upon which sentence enhancement was based in this case. Even if the Petitioner were to grant to the Respondent the applicability of the definition enumerated in Footnote 13, Petitioner would still fall outside the scope of Section 924(e) "burglary" as

defined in that Footnote, because one of Petitioner's supporting convictions was for a situation where Petitioner never gained entry to the warehouse. That offense would not even satisfy this "permissive" definition of criminal activity. Furthermore, by citing to legislative history arguments, rather than the text of the statute itself, the Respondent's seek to place a liberal interpretation on this statute which the principles of lenity and equity would not allow.

While we might concede that the 1986 Amendments to the Armed Career Criminals Act sought to broaden the application of the Act, the Amendments sought to broaden the application to other types of violent crimes and drug offenses, not to other

offenses which may or may not constitute burglary. The Amendments served to switch the focus or attention of the Act from violent burglary or robbery to encompass all violent crimes. While we would concede that this was the purpose and intent of the Amendments, we would not concede that these Amendments served to broaden the earlier Act's application to include nonviolent criminal activity. Indeed, we would argue that there was never any serious Congressional intent or support for this application of Section 924(e). Application of sentence enhancement is not appropriate in this matter because the past criminal activity upon which Petitioner's sentence enhancement was based does not contain the requisite criminal violence to

support sentencing under Section 924(e). While the legislative history does contain the opinions of some individuals who recommended an expansive application of Section 924(e), we believe that this statute covers only those violent offenses and violent criminals who present a threat to society.

We would further argue that Respondent's total reliance on legislative history and casual dismissal of the principle of lenity do not accurately mirror the opinions or precedent of this Honorable Court. The Supreme Court has long recognized that when Congress uses a common law term, such as burglary, without otherwise defining it, Congress is presumed to have adopted the meaning given that term at

common law. Morrissette v. United States, 342 U.S. 246, 263 (1952). When Respondent argues that reverting to use of common law definitions is not appropriate, they are in actuality arguing against the precedent of this Court, which has held that in those circumstances the only appropriate avenue was to revert to the common law definition.

Furthermore, the Respondent's reliance on legislative history is misplaced in this instance because the legislative history is inconclusive. History is cited in both the decisions which hold that the common law definition is appropriate and those which hold that it is not. Therefore, the final statute is and should suffice as embodying those

factors which Congress intended. As we have argued in our Petition for Certiorari, the intent of this Act was that it be applied against those who have committed violent or serious crimes, while not demeaning the seriousness of any criminal act, we do not believe that the past criminal activities of Petitioner, utilized to justify enhancement, are sufficiently criminal or violent in nature to sustain a Section 924(e) sentence enhancement. In allowing an overbroad application of Section 924(e) the Court would, in the end, undermine the statute's credibility and stymie its effectiveness.

While Respondent argues that the Court should heed "legislative history," Petitioner respectfully requests that the

Court heed statutory language. The legislative history on this matter is brimming with the testimony of District Attorney's from all over the United States concerning their opinions about this statute. While their opinions are no doubt important, they are nevertheless merely their personal opinions. The opinions of these District Attorney's and the opinions of the Bill Sponsor's cannot be said to be and should not be argued to comprise the opinions of all the members of Congress or the intent of Congressmen as a whole in passing this Bill. Therefore, this Court should not accept Respondent's arguments expressing same.

Respondent's cite to much of the legislative history concerning Section 924(e) in the body of their Brief in

Opposition. However, some of the passages which they have chosen echo the arguments made here by Petitioner. Even Representative Hughes, the Chairman of the House Subcommittee on Crime, indicated that this Act was intended to apply to someone beyond the caliber of the run-of-the-mill burglar. We contend that Leonard's convictions do not meet this test. His convictions for purpose of sentence enhancement are simply not of sufficient magnitude or violence. Furthermore, as Representative Hughes suggested, the drafters intended that this provision be applied against those career criminals who were apprehended while using a firearm during the commission of some other crime, when Petitioner was apprehended he was charged

solely with a violation of this Act. It appears clear that the Congressmen who adopted this legislation, and the men like Representative Hughes who worked on the committees which drafted it, did not intend for this Act to apply to less serious or nonviolent crimes. As Representative Hughes noted:

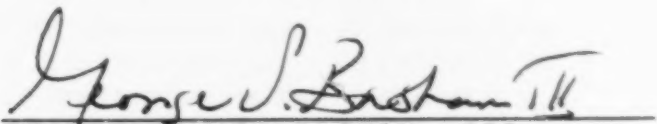
> We are talking about burglaries that probably are being carried out by an armed criminal, because the triggering mechanism is that they possess a weapon. That triggers Federal jurisdiction to begin with. So we are not talking about the average run-of-the-mill burglar necessarily, we are talking about somebody who also illegally possesses or has been transferred a firearm.
> Armed Career Criminal Legislation: hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 4 (1986) at 41.

CONCLUSION

For the foregoing reasons, as well as those which have been urged in the

Petition, Certiorari should be granted. We would request at this time that if this Court should determine that some other case is ripe for review construing Section 924(e), that this matter be consolidated for review with the case. [See Petitioner's Motion to Consolidate filed jointly with this Response Brief.]

Respectfully submitted,



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JULY 1989